IN THE

Supreme Court Of The United States

No. 80-278

OCTOBER TERM, 1980

Lee Munson, Prosecuting Attorney,
Sixth Judicial District,
State of Arkansas
Petitioner

v.

Thomas Womack,
Respondent

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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STATEMENT OF THE CASE

Petitioner, Lee Munson, the duly elected Prosecuting Attorney of the Sixth Judicial District of the State of Arkanas from 1975 through 1979, discharged Respondent, Thomas Womack, a black investigator, in July of 1975 and began representing Pulaski County Sheriff Monroe Love shortly after Respondent filed suit against the Sheriff under 42 U.S.C. §§1983 and 2000(e) alleging racial discriminatory practices. Respondent then filed a

Complaint with the Equal Employment Opportunity Commission charging Petitioner with unlawfully dismissing him because he filed a lawsuit against the Sheriff. In a letter response to the Equal Employment Opportunity Commission, the Petitioner indicated that the Respondent was discharged because of marginal productivity, poor judgment and because he had admitted abusing blacks while a Deputy Sheriff. (Joint Ex. 3; R. 5) After receiving a right-to-sue letter from the Equal Employment Opportunity Commission, Respondent brought suit in Federal District Court against Petitioner alleging retaliatory discharge.

During the trial, Petitioner and Respondent jointly introduced a June 9th and June 26th, 1975 memorandum by Chief Deputy "Dub" Bentley of the Prosecuting Attorney's office which basically provided an uncontested statement of the events which led up to Respondent's discharge (Joint Ex. 1 and 2; R. 4). The June 9th memorandum indicated that on June 5th, 1975, Petitioner called Respondent into his office after learning of Respondent's suit against the Sheriff which had been filed on June 3rd and told him that he had placed the Prosecuting Attorney's office in an embarassing position because it might appear the office sanctioned his charges. Respondent was also advised that the lawsuit presented a further problem because the Petitioner was responsible for defending the Sheriff against such actions. Petitioner told Respondent that he should consider a leave of absence until the matter was settled and that he would try to find Respondent other suitable employment during the pendency of the lawsuit to minimize any economic hardship. [1]

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1. The Petitioner's statement of the case did not reveal that Respondent was asked to take a leave of absence before Petitioner's stated reason for discharging Respondent occurred.

Immediately following this discussion Petitioner inquired about some of the allegations contained in Respondent's Complaint against the Sheriff, specifically inquiring about an allegation that the Sheriff required his deputies to physically abuse black criminal suspects. At this time Respondent made statements which were construed by the Petitioner and other staff members as an admission of abuse. However, no specific instance of abuse was inquired into and none was mentioned. Apparently unconcerned about any admission by Respondent, Petitioner concluded the meeting by advising Respondent that he would assist him in finding suitable employment. The next day, Friday, June 6, 1975, Petitioner advised Respondent that he would assist him in obtaining a quasi judicial position as a hearing officer which was available with the Arkansas Revenue Department in Forrest City, Arkansas. On Monday, June 9, the Respondent indicated to Petitioner that he would not take a leave of absence and did not want to relocate to Forrest City, Arkansas. Although Respondent's refusal was contrary to Petitioner's expressed preference, before taking any action against Respondent, Petitioner went to discuss the matter with the Sheriff. Upon returning, Petitioner promptly suspended Respondent pending a further investigation into his fitness to continue employment as an investigator. Petitioner appointed one of his deputies to conduct the investigation, which ~~nobody~~ not only produced no evidence of physical abuse of black suspects by black officers, but no evidence that Respondent was unfit to continue his employment.

After completing the investigation and filing an Answer in Federal Court on behalf of the Sheriff's office in response to Respondent's Complaint, Petitioner notified Respondent on June 26, 1975 that he was being terminated effective July 15, 1975. The June 26th memorandum by

Bentley indicates that Petitioner was advised that he was being discharged for:

1. Moonlighting as an armed security guard;

2. Campaigning for political office; and

3. Admitting mistreatment of blacks while employed as a Deputy Sheriff.

Notwithstanding the reasons given Respondent on June 26 for his discharge, Petitioner testified for the first time at trial that he fired Respondent solely because he had *admitted* and then *denied* that he had mistreated blacks while a Deputy Sheriff. During his testimony, Petitioner not only admitted that Respondent had been a good employee whom he had been willing to recommend for a quasi judicial job, notwithstanding his assertion that Respondent was untrustworthy, but that he again actually deputized Respondent after the lawsuit against the Sheriff was settled. [2] In fact, the Petitioner had never even advised Respondent that he was being discharged for this reason. The District Court held that Respondent had made a *prima facie* case of retaliation but concluded that the case had been rebutted by articulation of a legitimate, non-discriminatory reason, i.e. admitting mistreatment of blacks, even though the Petitioner himself no longer relied upon that reason to justify his discharge of Respondent. The Court of Appeals reversed holding that the alleged reason for dismissing Respondent, admitting abuse of black

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2. Petitioner's statement of the case did not reveal his stated reasons for Respondent's discharge, nor the fact that the Sheriff was consulted before he was discharged and that Respondent was put back to work when his suit with the Sheriff was settled.

suspects and then denying making the admission, was so inextricably related to the allegations in his Complaint that it could not be considered as a legitimate reason for discharge. The Court further held that even if such a reason were considered a legitimate reason the District Court's finding that it was not pretextual was clearly erroneous.

REASONS FOR DENYING THE WRIT

I. The decision of the Eighth Circuit Court of Appeals is consistent with applicable decisions of this Court which have held that an employer may rebut a prima facie case of employment discrimination by articulating a legitimate non-discriminatory reason for his actions. The Circuit Court did not require Petitioner to prove an absence of discriminatory motive in rebutting Respondent's prima facie case.

Although the Petitioner contends otherwise, no dispute exists between petitioner and respondent or the Court of Appeals concerning the burden of proof in a title VII employment discrimination case. Respondent recognizes that he has the initial burden of establishing a prima facie case of unlawful discrimination and that once the burden is met, the employer need only articulate some legitimate, non-discriminating reason for his actions. Respondent further recognizes that the employer need not prove the absence of discriminatory motive when articulating a legitimate non-discriminating reason and that once such a reason is articulated by the employer the plaintiff has the burden of establishing that it is pretextual. These legal principles were not in issue in the trial court and were clearly adhered to by the Court of Appeals. In fact, the Court of Appeals could not have used more forceful language in embracing these legal principles than when it stated:

> Once Womack had made out a *prima facie* case of retaliatory termination, the burden shifted to Munson to articulate a legitimate, nondiscriminatory reason for the dismissal. *Miller v. Williams*, 590 F.2d 317, 320 (9th Cir. 1979); *Hochstadt v. Worcester Foundation*, 425 F. Supp. at 324. *Munson did not have to prove absence of retaliatory motive, but only produce evidence that would dispell the inference of retaliation by establishing the existence of a legitimate reason. Furnco Construction Corp. v. Waters*, 438 U.S. at 577-78, *Kirby v. Colony Furniture Co.*, No.78-1808, slip op. at 9-10 (8th Cir. Jan. 9, 1980). If Muncon produced evidence of a reason other than retaliation, Womack could still prevail if the evidence showed the proferred justification was in fact a pretext, a cover up for retaliation. *Aguirre v. Chula Vista Sanitary Service*, 542 F.2d at 781; *Hochstadt v. Worchester Foundation*, 425 F. Supp. at 324. *The overall burden of persuasion remained with Womack.* (Petitioner's Appendix A, p. 7a) (*emphasis applied*)

The Court of Appals plainly followed this Court's prior decisions and did not require Petitioner to prove the absence of discriminatory motive. Moreover, any contention by Petitioner that the Court of Appeals only gave lip service to these legal principles simply goes to the question of substantial evidence to sustain the findings of the District Court, an issue which has no legal significance outside the context of this case.

II. The Eighth Circuit Court of Appeals gave proper deference to the trial judge's credibility findings.

Petitioner contends as a justification for granting certiorari that the Eighth Circuit Court of Appeals did not give proper deference to the trial judge's credibility finding. Not only is this contention meritless, but it does not constitute a substantial justification for granting certiorari. It is merely an effort to get this Court to review a

substantial evidence question simply to obtain another opinion on the same set of facts.

A factual reconstruction of the events leading up to Respondent's discharge was supplied by Chief Deputy "Dub" Bentley in the form of memoranda prepared as the events were unraveling. Although Mr. Bentley testified in court, his testimony, which the trial court found to be particularly credible, was not as expansive as his written accounts. These written accounts provided the factual foundation for the Court of Appeal's definite and firm conviction that the trial court was mistaken in its findings that Petitioner's stated reason for discharging Respondent was not pretextual. The record in the trial court, therefore, not only consisted of the witnesses' testimony, where credibility findings would be particularly relevant, but of reliable written accounts made as the events occurred. The Court of Appeals did not hold that there was no substantial evidence to support the trial court's findings that an admission and denial occurred, but that any admission and subsequent denial by Respondent of prior bad conduct was clearly not the reason for his discharge. Neither this holding, nor the process of review by the Court of Appeals of the trial court's decision constitutes such a departure from accepted and usual course of judicial proceedings as to justify an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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see 276